IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

WILLIAM L. BAUGHN,
Plaintiff/Appellee,

v.

STAKER & PARSON COMPANIES, INC.,
Defendant/Appellant.

No. 2 CA-CV 2017-0209
Filed October 22, 2018

Appeal from the Superior Court in Pima County
No. C20150432
The Honorable Jeffrey T. Bergin, Judge

VACATED AND REMANDED

COUNSEL

Miller Pitt Feldman & McAnally PC, Tucson
By Stanley Feldman

and

Waterfall, Economidis, Caldwell, Hanshaw & Villamana P.C., Tucson
By Barry Kirschner
Counsel for Plaintiff/Appellee

Durham Jones & Pinegar P.C., St. George, Utah
By Elijah L. Milne and David L. Arrington
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 In June 2017, a jury rendered a verdict in favor of William Baughn in his personal injury action against Staker & Parson Companies, Inc. ("Staker") and found Staker liable for 60% of Baughn's damages. On appeal, Staker argues the trial court erred in denying its motions for judgment as a matter of law and for new trial because three of the four elements of Baughn's negligence claim—duty, breach, and causation—were not supported by the evidence, and also contends the court improperly allowed certain expert testimony presented by Baughn, and the introduction of an irrelevant and prejudicial exhibit. For the following reasons, we vacate the court's judgment and remand for entry of judgment consistent with this decision.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *Zuluaga ex rel. Zuluaga v. Bashas', Inc.*, 242 Ariz. 205, ¶ 2 (App. 2017). In January 2014, Baughn was working as a driver for BDR Transport ("BDR"), an independent contractor hired by Staker to haul rocks at the "Ina Mine," a surface sand and gravel pit operated by Staker. BDR drivers transported rock and sand from the bottom of the pit, where Staker employees would bulldoze the dirt and load it onto the trailer, to the top of the pit "so [Staker] could put it on the crusher and . . . make [its] own materials, [such as] . . . half inch rock, . . . sand, . . . [and] pea gravel." Over the course of a full day at the Ina Mine, each truck would transport thirty to forty loads from the bottom of the pit to the unloading site almost a mile away.

¶3 On January 29, 2014, just after unloading, Baughn noticed "a rock between the dual tires in the back of his truck." He "tried to get [the rock] out" by hitting it with a hammer, but it "kind of broke up funny" and "didn't come out too good, so [he] decided not to mess with it," concluding it was not "safe to hit on it any more." Baughn then drove back down to

the pit and loaded the truck again before "waiting for [someone] that had a bar [they] could stick in there . . . and either pull forward or back up [the truck], and it would pop the rock out." Baughn testified he did not remember what happened next, but stipulated that he tried hammering the now-splintered rock again after reloading the truck, and at that point the dual tires exploded, causing Baughn serious injuries.

¶4 Baughn subsequently filed suit against Staker, BDR, and certain individuals, alleging negligence and "spoliation of evidence" for the defendants' failure to report, investigate, or preserve evidence from the scene. In August 2016, all named parties filed motions for summary judgment.

¶5 Following a hearing on the motions for summary judgment, the trial court denied Baughn's motion, finding "there are questions of fact as to whether the defendant complied with any standard of care that may apply." The court similarly concluded "there is a question of fact as to whether . . . [the] standard of care was satisfied concerning the provision of . . . information and/or training and that's a question for the jury to decide, not for the Court."[1]

¶6 In April 2017, Staker filed several pretrial motions in limine, among them a motion to exclude the expert testimony of Jack Spadaro, who was expected to testify that Staker had breached duties owed under the federal mining regulations. Staker argued that such testimony would "invade[] the role of the judge to instruct the jury on the law" and "usurp[] the province of the jury to weigh and evaluate disputed facts and decide the question of fault." Another motion sought to exclude an internal "best practice" document on the basis that "Staker did not have a duty to provide training to [Baughn] or information to BDR regarding Staker's best practices for . . . removing rocks from dual tires" such that the "document is irrelevant, has no probative value, and its introduction, admission and any testimony about it will confuse the issues, mislead the jury, waste time, and substantially prejudice Staker," citing Rules 401 and 403, Ariz. R. Evid. The trial court denied both motions as they related to the issues raised in this appeal.

[1]The trial court granted summary judgment in favor of both Staker's Ina Mine manager and BDR.

¶7 The case proceeded to trial in May 2017. During Baughn's opening statement, his counsel asserted "one of the problems which was significant, frequent, persistent was what's called spillage from overloading the truck trailers," which caused "rocks [to get stuck] between dual tires" – a "site specific hazard," that required "site specific training" for "contractors like Mr. Baughn," and "the accident would not have occurred" had Staker provided such training or its best practice document. On the fourth day of trial, Baughn introduced Spadaro as an expert in "mining and mining regulation in the United States." During Spadaro's testimony, Staker more than once objected on the basis that the witness was being asked to testify to matters of law. One objection was sustained but another was overruled.

¶8 The jury ultimately returned a verdict in Baughn's favor, finding Staker responsible for 60% of Baughn's damages, BDR responsible for 15%, and Baughn responsible for 25%. The trial court subsequently entered judgment pursuant to Rule 54(b), Ariz. R. Civ. P., awarding Baughn damages and taxable costs. Staker filed a renewed motion for judgment as a matter of law and an alternative request for a new trial or remittitur, arguing there was insufficient evidence to support the verdict under the duties submitted to the jury. Staker's motion also asserted the evidence did not support the damages awarded and allowing Spadaro's testimony and the admission of the best practice document were "material error[s] of law." The court denied the motion without explanation, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Discussion

¶9 On appeal, Staker contends the evidence demonstrated that it owed no duty to protect Baughn from open and obvious rocks on the haul road and further challenges the sufficiency of the evidence of breach and causation, as well as the admission of the expert testimony and Staker's best practices document. We review de novo the denial of a renewed motion for judgment as a matter of law. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, ¶ 6 (App. 2011). The denial of a motion for new trial is reviewed for an abuse of discretion. *Stafford v. Burns*, 241 Ariz. 474, ¶ 10 (App. 2017). The existence of duty to another is an issue of law also reviewed de novo. *See Quiroz v. ALCOA Inc.*, 243 Ariz. 560, ¶ 7 (2018).

¶10 Staker first argues it "did not owe a duty vis-à-vis the wedged rock and, if it did, the duty was discharged." At trial, the final jury

instructions presented three forms of duty to the jurors for their consideration: (1) the duty of a business owner "to use reasonable care to warn of or safeguard an unreasonably dangerous condition of which [it] had notice," (2) the duty of a general contractor "to provide [BDR employees] a reasonably safe place to work," and (3) the duty of a possessor of land to "use reasonable care to correct or warn persons" of dangerous conditions that are not "sufficiently open and obvious or known to the persons." Staker challenges the sufficiency of the evidence with regard to each of these principles, and we address each argument in turn.

Staker's Duty as Business Owner

¶11 The jury instruction regarding the duty of a business owner derived from *Preuss v. Sambo's of Arizona, Inc.*, 130 Ariz. 288 (1981). In that case, our supreme court observed, "The law is clear in Arizona that the proprietor of a business is under an affirmative duty to make the premises reasonably safe for use by invitees." *Id.* at 289. To advance a successful claim under this theory of liability, the plaintiff must prove that the defendant caused or created the dangerous condition, "had actual knowledge or notice" of it, or "should have known of it and taken action to remedy it" because it had "existed for such a length of time." *Id.* (quoting *Walker v. Montgomery Ward & Co.*, 20 Ariz. App. 255, 258 (1973)).

¶12 Staker argues "the rock of itself was not 'unreasonably dangerous.'" In particular, Staker asserts "the uncontroverted evidence shows that, although rocks always exist at rock mines and sometimes become lodged between duals, no one had ever been injured at the Ina Mine as a result," and "there is no evidence that the mere lodgment of a rock between duals posed a risk of harm to Baughn." Rather, it was solely Baughn's action of using a hammer to try to remove the rock that created an unreasonably dangerous condition. Baughn counters that Staker was responsible for preventing unsafe conditions over the portion of the work it controlled and the evidence "showed Staker employees overloading trucks, persistently tolerating spillage, and failing to maintain its road, thus increasing the likelihood of just what occurred in this case. Staker's negligent acts actually created the danger that was a cause of Baughn's injury."

¶13 Arizona precedent establishes that many things can become a dangerous condition under certain circumstances. *See, e.g.*, *Preuss*, 130 Ariz. at 288 (plaintiff, although unsuccessful because no proof defendant had notice, slipped on "what she thought was a small rock"); *Walker*, 20 Ariz.

App. at 257 (plaintiff slipped on "a peach, or a piece of a peach"); *Burke v. Ariz. Biltmore Hotel, Inc.*, 12 Ariz. App. 69, 71 (1970) (plaintiff slipped because of stairway's "deceptive appearance"). Whether any particular rocks or the rocky condition of the haul road constituted an unreasonably dangerous condition is usually a question of fact for the jury to determine. *See McLeod v. Newcomer*, 163 Ariz. 6, 9 (App. 1989). But we must consider whether the jury here could find from the evidence presented that the rocks created an unreasonably dangerous condition. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 4 (App. 2009) (expressing sufficiency of evidence standard of review "in various ways," including "if substantial evidence exists"); *Flanders v. Maricopa Cty.*, 203 Ariz. 368, ¶ 49 (App. 2002) (in considering sufficiency of evidence, appellate court looks to "broad scope of the trial" without reweighing the facts).

¶14 While there was evidence that Staker regularly tolerated spillage and did not always maintain the haul road, no evidence was presented upon which the jury could find that these factors presented an unreasonable danger to Baughn or any other driver. Witnesses referred to a general "hazard" from rocks, but there was no substantial evidence that these rocks, or the consequences of rocks being lodged in tires, presented any danger to the drivers, either general or specific. Baughn asserts that Staker's practice of overloading trucks created a "serious danger because rocks would get stuck between the trucks' dual tires, eventually causing tires to explode and drivers to lose control." The testimony cited in his briefs, however, does not support this assertion.

¶15 At oral argument before this court, Baughn claimed that the testimony of Juan Baro, Jesus Cantu, and Miguel Gamez supported his claim of unreasonable risk of injury from rocks in the road. With the exception of Gamez, these are the same witnesses cited in Baughn's briefs. A review of their testimony, however, reveals no indication of any risk of injury to truck drivers from rocks on the haul road. Baro, a BDR driver at the Ina Mine at the time of Baughn's accident, testified that "having a rock that would lodge between dual tires is not a good thing" but when asked what problems that could cause, he only said "it could pop one of the tires." When further questioned, he did not indicate that this created any risk of injury to drivers, but only that spillage could "create a hazard of rocks that would potentially lodge between dual tires," slow down production, and cause damage to the trucks. It is notable that the speed limit on the haul road was 11.5 miles per hour.

¶16 Cantu, another BDR driver, testified about overloading and spillage, but, like Baro, never mentioned any danger these conditions presented. The closest a witness came to describing any risk of injury posed by rocks on the haul road was a comment by Miguel Gamez, general manager at the Ina Mine. In response to being asked whether the road condition "would not only potentially be damaging to equipment, but also to the safety of the drivers of that equipment," he responded "[t]here's no money in tearing apart a truck or an employee." This one isolated remark, however, was not sufficient evidence on which to support an unreasonable risk of injury to drivers, particularly in light of Gamez's further testimony and other evidence that no accidents involving rocks had ever occurred or been reported at the Ina Mine. *See Collette v. Tolleson Unified School Dist.*, 203 Ariz. 359, ¶ 30 (App. 2002) (no duty where "no evidence" of a situation that "poses an unreasonable risk of harm"); *see also Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 13 (App. 2007) (no notice of dangerous condition where accident was the first reported to occur and no evidence that business owner was aware of any previous injuries). Because there was no evidence that the spillage and rocks on the road created a risk of injury to the truck drivers, Staker was entitled to judgment as a matter of law on that theory.

Staker's Duty as General Contractor

¶17 Staker also maintains the evidence did not show that it owed any duty to Baughn as a general contractor, asserting that "operating trucks with dual tires among rocks was precisely what BDR was hired to do" and that Staker retained no control over "the operation and maintenance of BDR's trucks." The jury instruction relating to this duty was based on *Lewis v. New Jersey Riebe Enters., Inc.*, in which our supreme court stated, "Although a general contractor has a general duty to provide a reasonably safe workplace for the employees of subcontractors, the scope of this duty extends only as far as the amount of control the general contractor retains over the work of the subcontractor," such that the general contractor "is liable for any injury caused by its negligent exercise of that retained control." 170 Ariz. 384, 388 (1992). The court noted that for liability to attach, a general contractor "must have retained some measure of control *not over the premises of the work site*, but over the actual work performed by" the subcontractor. *Id.* at 390 (emphasis added). The court also noted that "the issue of retained control is . . . a question of fact[,] which ordinarily should be left to the fact finder." *Id.* at 389 (emphasis omitted). Here, while the jury was correctly instructed, the record again does not contain

substantial evidence to support this theory of Staker's liability. *See Denise R.*, 221 Ariz. 92, ¶¶ 3-6.

¶18 First, the contract governing the relationship between Staker and BDR expressly provided that Staker was "to exercise, and have no control over the method and means of accomplishing the work other than to see that the desired results are achieved at the lowest possible cost." Thus, contractually, Staker had no power or say over how BDR and its employees removed rocks from their equipment. At trial, Baughn's only evidence of retained control was that Staker was responsible for maintaining the loading site, the haul road, and the dump site. But there was no evidence that Staker had any influence over how BDR or its employees operated or maintained its trucks, fixed flat tires, or removed rocks stuck between tires. Although Baughn argues "[a]ll of the truck drivers used percussion to try to dislodge rocks between dual tires" and "no instruction was ever given to not use a hammer or similar tool," Baughn identified no obligation on the part of Staker to instruct BDR employees on how to address such operational issues, other than by citing non-applicable federal regulations, which we address next.

¶19 Notwithstanding the express limitations of Staker's control under its contract with BDR, Baughn insisted, through expert testimony and in argument to the jury, that rocks becoming stuck between tires and "having to remove those rocks" was a site-specific hazard, for which Staker was required to provide site-specific hazard training under federal mining regulations. At trial, Baughn's expert was asked:

> *Q.* Are you familiar with the statutory purpose and the purpose of the mining regulations in how any division of responsibility between mine owners and independent contractors that they might hire, would occur as—as it addresses site specific hazards?
>
> *A.* Yes. The mine owner, the production operator is required to [e]nsure that site specific hazard training is given to truck drivers or others who come on the property and make sure that it has been done.
>
> . . . .

> *Q.* Having created the written regulations on how to remove—removing rocks from duals, and knowing from testimony what occurred in distributing or not distributing that, do you have an opinion on whether the standard of care and training regarding removing rocks from duals has been violated?
>
> *A.* Yes, it definitely was violated.

¶20 And during his closing argument to the jury, Baughn stated that having rocks lodged between dual tires was, "[i]n the language of the mine," "a site specific hazard." He argued "[t]he mine owners know what the site specific hazards are and they are charged with" making "certain that conditions are safe and the people are safe within the mine" and there would be "no cost" to provide training to BDR employees.

¶21 That testimony and argument was, at least in part, contrary to law and misleading to the jury. Under 30 C.F.R. § 46.12(a)(1), a mine "production-operator has primary responsibility for ensuring that site-specific hazard awareness training is given to employees of independent contractors *who are required to receive such training under § 46.11*." (Emphasis added.) Section 46.11(b), however, mandates training only for "any person who is not a miner." Section 46.2(g)(1) defines a "miner" as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations"; this "includes independent contractors and employees of independent contractors who are engaged in mining operations." Mining operations are in turn defined by § 46.2(h) to include the "associated haulage of materials within the mine" from "development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine." Baughn acknowledges he was a "miner"; as such, Staker had no obligation under the mining regulations to provide him with any instruction or training. Staker repeatedly pointed this out to the trial court, both in its pretrial motion in limine, and more than once at trial.

¶22 Baughn also points to Staker's "best practice" guidelines, contained in its internal document entitled "Best Practices Cleaning Off Trucks," as evidence of Staker's retained control. Staker, however, did not provide this document, prepared for its own personnel, to BDR employees at the Ina Mine, and, as explained above, was under no obligation to do so, particularly given the absence of any rock-related accidents at its mine. *See Brookover*, 215 Ariz. 52, ¶ 13. To the extent Baughn contends that creating

an internal policy and failing to disseminate or follow it is evidence that Staker retained control over the manner in which BDR employees removed rocks from dual tires, the argument is unpersuasive. This court has expressly noted that an internal policy does not create a duty, but rather, "[t]he undisputed facts of the limited undertaking" is the "foundation for determining whether a duty exists." *Diaz v. Phoenix Lubrication Serv., Inc.*, 224 Ariz. 335, ¶ 27 (App. 2010); *see also Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, ¶ 22 (App. 2013) (failing to comply with internal policy does not create duty). It is also notable that even had Staker been under a duty to provide its best practices document to Baughn, any failure to do so could not have been a proximate cause of Baughn's injury because BDR had its own policy and rules instructing its drivers on procedures for addressing rocks in tires, and Baughn admitted he was aware of, but did not follow, them. In sum, because there was no evidence of Staker's retained control over BDR or Baughn, and, in fact, the evidence was to the contrary, judgment as a matter of law should have been granted to Staker on this theory of liability.

Staker's Duty as Possessor of Land

¶23 Staker lastly challenges the duty it owed as a possessor of land, because "a rock wedged between BDR's tires was not a condition of the 'premises,'" any danger therefrom was "open and obvious," and the evidence showed that if any duty was owed it "was discharged as a matter of law because of BDR's and Baughn's actual knowledge." The trial court's jury instruction regarding these issues derived from *Markowitz v. Arizona Parks Board*, in which our supreme court recognized that possessors of land have a duty "to discover and correct or warn of hazards which the possessor should reasonably foresee as endangering an invitee." 146 Ariz. 352, 355 (1985). Because Staker was a possessor of land and Baughn, as an employee of independent contractor BDR performing work for Staker, was a business invitee, Staker clearly owed a duty to Baughn of providing a workplace free of unreasonably dangerous conditions. *Id.* The *Markowitz* court, however, also noted "it may be said in some cases as a matter of law that defendant's actions or inactions do not breach the applicable standard of conduct." *Id.* at 357.

¶24 The evidence at trial established that the condition of rocks on the haul road and the common occurrence of their becoming wedged between tires was open and obvious. Although Staker employees Miguel Gamez and Phillip Fabijanic testified they were unaware that rocks would

get lodged in tires, BDR's truck drivers who were called as witnesses all testified they were aware of rocks on the haul road and of those rocks routinely getting stuck between their dual tires. Juan Baro testified he had observed spillage and was cautious while he tried "to avoid running over rocks which would potentially become lodged between" the tires. Jesus Cantu similarly observed rocks that would roll under trucks or be run over by drivers. Joseph Whitmore testified it was "fairly common for BDR drivers to get . . . rocks between their dual tires," and Merle Matthews testified it was "common sense" and "clear you'd get rocks stuck" from driving at the mine. Baughn himself testified that the dump site was the "worst place" because that is where a driver is "most likely going to get a rock." Thus, there was no evidence that rocks at the mine were a hidden or latent hazard to the truck drivers in general, or to Baughn specifically, in any way. The overwhelming evidence was that the drivers at the mine, including Baughn, were well aware of the existence of rocks on the haul road and that those rocks could and did get stuck between their tires.

¶25 The evidence at trial also demonstrated that the danger of attempting to remove a rock from a truck tire with a hammer was well known to Baughn before he was injured. Baughn testified he knew of "safer ways to remove a rock than hitting it with a hammer," and initially he was "waiting for [someone] that had a bar [they] could stick in there," and he could "pull forward or back up, and it would pop the rock out." He also acknowledged that at one point, before the tires exploded, he "didn't think it was safe to hit" the rock anymore because he knew it could potentially injure him. Following the accident, he was quoted as saying it "wasn't smart . . . to hit on that rock," that it "was stupid," and "that he knew better." Thus, the evidence failed to show that rocks in the road, and any danger they might pose after becoming lodged between dual tires, was anything but open and obvious. Accordingly, although Staker owed a duty to Baughn as a landowner, it could not have breached its duty by failing to warn Baughn about the rocky condition of the road or potential danger in removing rocks from tires by striking them. *See Markowitz*, 146 Ariz. at 357; *see also Bellezzo v. State*, 174 Ariz. 548, 552 (App. 1992) (no negligence as matter of law when danger of being struck by foul ball at baseball stadium open and obvious).

¶26 As our supreme court observed in *Markowitz*, one may know a condition is generally dangerous without being aware of the actual existence of that condition, but it is markedly different to act knowing that the dangerous condition exists. 146 Ariz. at 358. "It is one thing to know

that it is dangerous to dive in shallow water. One may dive with such knowledge, thinking that the water *is not* shallow. It is quite different to dive knowing that the water actually *is* shallow." *Id*. As noted above, unlike the unaware diver in *Markowitz*, Baughn knew with certainty that there were rocks on the haul road and that they could and did get stuck in tires. He also knew of the danger in attempting to remove such rocks by hand with a hammer. Thus, not only did Staker have no duty to warn Baughn based on his status as a miner, it did not breach its duty as a land owner by failing to provide its internal safety guidelines to him or otherwise warn him of an open and obvious condition.

¶27 And even had Staker provided its safety policy to Baughn, the evidence showed he would not have acted differently. Baughn admitted he did not read the few written materials his employer gave him because "[m]ost of the time you don't" because "it's pretty basic stuff." And Baughn also disregarded express instructions from BDR on the proper procedure for dealing with rocks lodged between tires. As a matter of law, the evidence was insufficient for a jury to conclude Staker breached its duty to Baughn as a possessor of land. *See Bellezzo*, 174 Ariz. at 551 (no negligence when defendant's conduct did not expose plaintiff to unreasonable risk of injury).

¶28 Our conclusion is further reinforced by Baughn's argument to the jury. He did not emphasize that Staker had violated its duty as a business owner, as a general contractor, or as a land owner to provide a safe work environment, but repeatedly urged that Staker had violated a duty to disclose the proper method of addressing rocks in truck tires, pointing to Staker's internal best practices document and the testimony of Spadaro that such disclosure was required by federal mining regulations. Although Baughn maintains on appeal that this properly evinced the standard of care breached by Staker, his argument to the jury undercuts that claim. While Baughn made cursory mention of Staker's responsibility to maintain the haul road and asserted that Staker was not "active and vigilant" in its maintenance, he continually conflated any duty Staker might have had in that regard with a non-existent duty to warn, and focused the majority of his liability arguments, from beginning to end, on Staker's best practice document, arguing it "was safety-oriented, circulating it could save lives and help people not be injured; not circulating it, is negligent." He continued that Staker "had a written regulation, rules about what to do and not to do; which, if they were followed," "the rock would not have been handled in such a way where [the tires] exploded." Baughn concluded that

Staker's not distributing the document to the BDR drivers showed its "lack of concern" for driver safety, and the "accident occurred because Staker did not care." The evidence at trial simply did not support those claims, either factually or legally.

¶29 Because Baughn presented insufficient evidence on the issues of duty to warn of unreasonably dangerous conditions on its premises and Staker's retained control over the work performed by BDR and Baughn, and because any "hazards" to the truck tires and risks of personal injury were not only open and obvious but specifically known to Baughn, we conclude the evidence was insufficient as a matter of law for the jury to find that Staker violated its duty to Baughn.[2]

Disposition

¶30 We vacate the trial court's denial of Staker's motion for judgment as a matter of law and subsequent verdict and judgment and remand to the trial court for entry of judgment for Staker, and any further proceedings consistent with this decision.

[2]Because we vacate the verdict and judgment on this ground, we do not address Staker's additional arguments challenging the admission of Spadaro's testimony and Staker's best practices document.